Supreme Court, U.S.
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No. 84-734

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

HELEN SMITH,
Petitioner,

vs.

FRED H. HARMSEN, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Where the jury was properly instructed that under a pendent state law claim all holders of the common stock of the United States National Bank as of the date of its insolvency were entitled to damages, does entry of judgment on that pendent claim in favor of such shareholders violate the Seventh Amendment?

2. Does the trial court's "reasonable interpretation" of the October, 1982 amendment to 28 U.S.C. § 1961, relating to calculation of post-judgment interest during the "transition period" surrounding that amendment, warrant review by this Court?

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Respondents, plaintiffs below, respectfully urge this Court to deny the petition of Helen Smith for a writ of certiorari.

Helen's primary claim, phrased in terms of the Seventh Amendment, in fact involves only the re-examination of a pendent state claim, uniquely grounded in California law. Nothing in the Ninth Circuit's handling of that claim in any way conflicts with other decisions of this Court or of other Courts of Appeal.

Helen's secondary claim concerns the proper method of computing post-judgment interest in that small group of cases where the relevant post-judgment period straddles the 1982 amendment to 28 U.S.C. § 1961. The Ninth Cir-

[1]Hereinafter "Helen" or "Mrs. Smith."

cuit's disposition of this issue, in its unpublished memorandum decision, does not raise an important question of federal law which requires review by this Court.

I

STATEMENT OF THE CASE

The United States National Bank ("USNB") was declared insolvent by the Comptroller of the Currency in October, 1973. Shortly thereafter, this action was filed on behalf of the shareholders of USNB, who had lost the entire value of their shareholdings. The matter was brought to trial in 1979, and the jury's verdict in favor of plaintiffs was rendered in December, 1979. The instant petition for certiorari is the most recent in a long series of appeals and petitions filed by Helen.

The class action complaint in this case alleged that the action was brought on behalf of *all USNB shareholders* (except defendants) *as of October 18, 1973*, the date that the receiver was appointed by the Comptroller. This class was certified under Rule 23, and that certification was upheld on appeal. *Harmsen v. Smith*, 693 F.2d 932, 942 (9th Cir. 1982), cert. denied ..... U.S. ....., 104 S.Ct. (1983).

The complaint alleged several different theories of liability, some federal (National Bank Act claims, plus claims for primary and secondary violations of the federal securities laws) and some pendent state claims (fraud, conspiracy to defraud, abuse of control and conspiracy to abuse control). As to petitioner Helen Smith, the jury found liability on three federal and three pendent state claims. Among the pendent state claims Helen was found liable for was *conspiracy to abuse control*, the "Count IX" claim involved in this petition.

The claim for conspiracy to abuse control was premised on the California Supreme Court's decision in *Jones v. H. F. Ahmanson & Co.*, 1 Cal.3d 93 (1969). In accordance with that case, and with the general principles governing conspiracy liability in California, the jury was instructed that all non-defendant sehareholders of USNB at the time of its collapse were entitled to recover on this count, regardless of "purchaser" or "non-purchaser" status (Plaintiffs' Instructions Nos. 13 and 16.) The jury was further instructed that damages resulting from conspiracy to abuse control could, under California law, be assessed for the entire period of the conspiracy, regardless of when each defendant joined the conspiracy. (Plaintiffs' Instruction No. 21; see *DeVries v. Brumback*, 53 Cal.2d 643, 648 (1960).)

Based upon these instructions, the jury entered its verdicts against Helen. Among other things, it found Helen liable for conspiracy to abuse control in the amount of $5,858,660.91. These verdicts, and the judgment entered on them, were affirmed by the Ninth Circuit in *Harmsen v. Smith, supra.* Helen's petition to this Court for certiorari was denied. 104 S.Ct. 89 (1983)

Pursuant to instructions from the Ninth Circuit, on remand the district court (Hon. William B. Enright) entered judgment describing the class members to whom each defendant was liable on each count. Among other things, that judgment specified that each defendant found liable under Count IX was liable to "all common shareholders of USNB on 10/18/73."

In addition, Judge Enright made a ruling on post-judgment interest in light of the amendment to 28 U.S.C.

§ 1961 in October, 1982. That ruling represented an intermediate position between the interpretations advanced by the plaintiffs and by Helen.

Helen took two actions in response to these various rulings at virtually the same time: (1) She petitioned to the Ninth Circuit for a *writ of mandamus* (9th Cir., No. 84-7035), challenging, *inter alia,* the two issues challenged in the instant petition; and (2) She filed an *appeal* to the Ninth Circuit, challenging the identical issues.

Helen's writ petition was denied by the Ninth Circuit on April 9, 1984. The Court's order reads, in pertinent part, as follows:

> The petition is denied. Petitioners fail to show that the district court erred in either its amended judgment or the other challenged orders. See *Bauman v. United States District Court,* 557 F.2d 650 (9th Cir. 1977).
>
> (See Appendix B hereto)

The appeal was heard by the Ninth Circuit on June 13, 1984 and decided, by memorandum decision, on August 6, 1984. As reflected at Appendix B to Helen's instant Petition, that memorandum decision reads as follows:

> These appeals are without merit. We properly concluded in *Harmsen v. Smith,* 693 F.2d 932 (9th Cir. 1982), *cert. denied,* 104 S.Ct. 89 (1983), that there was sufficient evidence to support a finding of liability of Helen Smith. The law of the case should stand unless there is substantially new evidence, new controlling authority, or unless the prior decision was clearly erroneous. *Handi Investment Co. v. Mobil Oil Corp.,* 653 F.2d 391, 392 (9th Cir. 1981). Appellants have made no showing of mistake by this court.

Appellants' other arguments must also fail. The amended judgment does not violate the seventh amendment. The jury was instructed that according to California law, see *Jones v. H. F. Ahmanson & Co.*, 1 Cal. 3d 93 (1969), liability runs to all USNB shareholders on Count IX. Thus, the damage award on that count is proper.

The district court properly calculated the interest rate. The purpose of the *nunc pro tunc* order was to protect appellees from the consequences of delay not attributable to their own fault and should not operate to deprive them of a change in law that will benefit them. Nothing in 28 U.S.C. § 1961 rules out the district court's reasonable interpretation.

The amended judgment does identify the classes with sufficient specificity to satisfy Fed. R. Civ. P. 23. Rule 23(c)(3) requires the judgment to "include and describe" the class, and amended judgment provides a clear description.

Finally, the amended judgment is sufficiently final to support execution. Appellants cannot successfully argue both that the amended judgment is final for purposes of review but not for purposes of execution.

Affirmed.

This petition followed.

II

REASONS REVIEW SHOULD BE DENIED

A. The "Seventh Amendment" Issue Involves Only Questions of State Law

Helen has repeated in this Court her efforts, made at both the district and the circuit court levels, to transmute her disappointment with the result in this case into some

sort of constitutional violation. At all prior levels, these efforts have been rebuffed, largely based on state law.

Helen's contention that judgment on Count IX in favor of all USNB common shareholders on October 18, 1973 violates the Seventh Amendment by "expanding" liability beyond that determined by the jury is without merit. Liability on this count runs in favor of all shareholders on that date because that is the theory on which the case was tried. The judgment on Count IX is in line with the jury's verdicts, the jury's manifest intentions, and the procedural history of the case. Hence there is simply no Seventh Amendment violation.

The judgment originally entered in January, 1980 was amended, per the instructions of the Ninth Circuit, to reflect the "sub-classes" of plaintiffs entitled to recovery on each count. For the federal securities (Rule 10b-5) related counts, recovery was limited to those USNB shareholders who purchased their shares during specified intervals of time, corresponding to each defendant's period of liability. With regard to Count IX, however, the claim for conspiracy to abuse control under California law, the judgment specified that *all* holders of USNB stock at the time of the Bank's collapse are entitled to recover. This is the theory on which the case was tried; this reflects the instructions which were given to the jury; this corresponds to California law as set out by the California Supreme Court in *Jones v. H. F. Ahmanson & Co.*, 1 Cal.3d 93 (1969); and this is the proper standard for recovery.

However, Helen contends that damages should *not* be awarded to all USNB shareholders on this count, regardless of the jury instructions and the California law, because

her "analysis" of the jury verdict suggests that the jury "must have" intended something different.

The trial court, Judge William B. Enright, quite properly declined to "dissect the jury verdict based on defendant's supposition." As he stated, in his Memorandum Decision of December 1, 1983:

> As to Helen Smith's argument that her liability extends only to those who purchased USNB stock after February 28, 1971, this court declines to dissect the jury verdict based on the defendant's supposition. Under Jury Instruction 21, any defendant could be found liable for all damages flowing from the conspiracy regardless of when they joined the agreement. Helen is liable to all USNB shareholders in the amount specified under Count IX.
>
> (Appendix A, p. A-6)

Instead of relying on "supposition", Judge Enright relied upon the law as given to the jury and as articulated in the controlling cases, all of which require that for this state law claim, recovery should be made available to all holders of stock at the time of the Bank's collapse.

This was made clear in the jury instructions. Instruction 16 informed the jury that they could award damages for all shares held by plaintiffs, in connection with the abuse of control counts, even if those shares were acquired by gift, inheritance, bonus or dividend, citing to *Jones v. H. F. Ahmanson & Co.*, 1 Cal.3d 93 (1969) and California Civil Code § 3333. Similarly, Instruction 13 provided:

> If you find that the plaintiffs currently possess USNB stock of no market value because of defendants' abuse of control and/or conspiracy to abuse control, you should find that the damages sustained include the full

> purchase price of the shares of USNB stock purchased by plaintiffs. (Citing *Jones v. H. F. Ahmanson & Co.*, 1 Cal.3d 93 (1969) and California Civil Code § 3333)

In addition, Instruction 21 provided:

> [F]or conspiracy to abuse control . . . [y]ou may find any or all of these defendants liable for all damages which accrued to plaintiffs as a result of this conspiracy since the date of its beginning, regardless of when each such defendant joined in this conspiracy. (Citing *DeVries v. Brumback*, 53 Cal.2d 643, 648 (1960))

Thus, as to Count IX liability for abuse of control, the damages awarded were *not* limited to a "sub-class" of purchasers during any given time period, as in the other counts against petitioner. Rather, as per the trial court instructions and the fundamentals of the state law theory of the case, *all* shareholders were entitled to recover damages.

Two things are apparent. First, no federal question is involved in this matter. The scope of the fiduciary responsibility imposed by *Jones v. Ahmanson, supra,* is a matter within the sound discretion of the California Supreme Court, as is the appropriate measure of damages. Second, the only improper "alteration" of the jury's verdict is that sought to be accomplished by Helen in this proceeding. Helen's tortured analysis of what the jury "must have thought" or "must have found" in its verdict five years ago is simply unsupported by the evidence, the instructions, the theory of the case or the verdict forms. Helen's argument would require precisely the kind of "re-examination" of the jury's verdict which the Seventh Amendment prohibits.

It is possible that there are some unresolved issues concerning the nature of questions appropriate for jury,

rather than judicial, determination in a class context. This case however, does not present those issues. It is therefore requested that the instant petition be denied.

B. The Question of Post-Judgment Interest under 28 U.S.C. § 1961 Does Not Merit Review

Helen's secondary contention in this petition is that the Ninth Circuit erroneously refused to disturb Judge Enright's disposition of the post-judgment issue question. This claim raises no issue of sufficient significance to warrant review by this Court.

This case is among the relative handful of federal cases involving a judgment *entered* prior to October, 1982 but finally *affirmed* after that date. In these few cases, the calculation of post-judgment interest is complicated by the fact that 28 U.S.C. § 1961 was amended effective October, 1982. Prior to that amendment, federal judgments bore interest at the state-imposed legal rate. After that amendment, such judgments bore interest at a rate based on the auction price of Treasury bills. The amendment did not provide specific guidance for the "straddle" situation.

In the instant case, Judge Enright heard argument from defendants (including Helen Smith) that interest at the lower (7%) state court rates should apply throughout the post-judgment period. He also heard argument from plaintiffs that interest at the higher (federal T-bill rates) should apply throughout the post-judgment period. His decision was an intermediate one:

> Interest on the judgments of all defendants shall be calculated to include interest at the rate of 7% from January 4, 1980 through October 1, 1982. From the

> period October 1, 1983 [sic—1982] through the present date, interest will be fixed by the option price of U.S. Treasury bills immediately prior to January 4, 1980.
>
> (12/19/83 Order, Appendix C to Petition)

The Ninth Circuit considered the propriety of this ruling twice, once on Helen's petition for writ of mandamus and once on Helen's appeal. Each time, it found no reason to disturb Judge Enright's ruling. In its unpublished memorandum decision, the Ninth Circuit stated as follows:

> The district court properly calculated the interest rate. The purpose of the *nunc pro tunc* order was to protect appellees from the consequences of delay not attributable to their own fault and should not operate to deprive them of a change in law that will benefit them. Nothing in 28 U.S.C. § 1961 rules out the district court's reasonable interpretation.
>
> (Appendix A to Petition)

That the Second Circuit may have approved a different approach does not invalidate the Ninth Circuit's reasoning. More to the point, the mere fact that different courts may take different approaches to this question does not make the question itself sufficiently important to justify review by this Court. As Helen herself points out, this issue is at best a question relating to the "transition period." Indeed, Helen's Supplemental Brief (p. 3) aptly, if inadvertently, describes the situation: "Further expenditure of scarce judicial resources on this issue [would be] wasteful and unnecessary."

There are no "special and important reasons" to grant review of this issue. Rule 17, Rules of the Supreme Court.

III

CONCLUSION

It is respectfully requested that Helen Smith's most recent petition for certiorari be denied.

DATED: November 27, 1984

Respectfully submitted,

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Appendix A

United States District Court
Southern District of California
Civil Nos. 73-460-E(M)
74-345-E(M)

Fred H. Harmsen, et al.,
Plaintiffs,

v.

C. Arnholt Smith, et al.,
Defendants.

[Filed Dec. 1, 1983]

MEMORANDUM DECISION

FACTS/BACKGROUND

In December 1979, the damage verdict in this class action securities action was returned against all defendants. In December 1982, the Ninth Circuit affirmed the judgments as to all defendants except J. A. Smith and First National Finance Corporation. *Harmsen v. Smith,* 693 F.2d 932 (9th Cir. 1982). After the defendants' petition for certiorari was denied, the mandate from the Ninth Circuit issued on October 24, 1983.

On November 21, 1983, this court heard argument from counsel on: (1) motions from defendants Helen Smith and Carol Smith Shannon to amend or correct the judgment, and (2) Receiver Tellam's application for authority to execute a listing on portions of the Valley Lane Farms property.

HOLDING

Upon due consideration of the parties' memoranda and exhibits, the arguments advanced at the hearing, and for the reasons set forth herein, the court takes the following action:

1. Denies, in part, the defendants' motions to amend or correct the judgment. The judgment prepared by plaintiffs' counsel, amended to comply with the dictates of the *Harmsen* decision, will be entered *nunc pro tunc* as of January 4, 1980.

2. Appoints David R. Hickey as Special Master to perform the accounting and administrative functions required in collecting and distributing the damage funds in this case.

3. Authorizes the plaintiffs to take the necessary steps to insure collection of the damage amounts due, including implementation of the Trust Agreements securing the judgments of defendants.

4. Takes under submission plaintiffs' suggested format for claims forms to the class members, pending further briefing by the parties.

5. Grants Mr. Tellam's application to execute a listing on the Valley Lane Farms property. The preliminary injunction restraining Helen Smith and the Bank of Irvine from foreclosing on Lot 7 of the property is extended to the expiration date of Merrill Lynch's 60-day exclusive listing period.

DISCUSSION

I. ANALYSIS OF THE HARMSEN DECISION

The Ninth Circuit specifically affirmed the judgments of all defendants except J. A. Smith and FNFC. *Harmsen, supra,* at 948. The *Harmsen* court directed this court to implement five steps upon remand:

(1) *Enter Judgment in Accordance with Fed. R. Civ. P. 23*

This entails entering an amended judgment describing the members of the class to whom each defendant was found liable on each count. The *Harmsen* court expressly noted that the earlier failure to include these descriptions did not prejudice the defendants. *Id.* at 942. The amended judgment properly reflects the subclass descriptions.

(2) *Return Excess Damage Funds After Distribution*

The Ninth Circuit instructed that "if there are excess damage funds after distribution, the district court should consider any feasible methods of returning that excess, with appropriate interest, to defendants." *Id.* at 946. Despite the defendants' assertions to the contrary, the determination of excess funds should take place following collection and distribution of the damages. Should excess funds remain *after* distribution to the class members, this court will, upon advisement from all parties, devise and implement a procedure for returning such funds to the defendants.

(3) *Consider Effect of Westgate California Insurance Company*

Harmsen indicates that the Westgate Insurance Company should not recover damages as a member of the

plaintiff class because defendant C. Arnholt Smith was the controlling shareholder in the company. *Id.* at 947. The Ninth Circuit directs this court to consider a possible reduction in the damages amount in light of this apparent conflict. In the interest of judicial economy, plaintiffs have agreed to exclude the entire damage award to Westgate Insurance Company from the total judgment. The amended judgment reflects this reduction of $1,000,008.

(4) *Offset Damages Already Paid by Settling Defendants*

The *Harmsen* court directs this court to offset settlements from other defendants. *Id.* at 948. The amended judgment reflects the $838,000 already paid by settling defendants as an offset to the compensatory damages owed by each defendant.

(5) *Establish a Claims Procedure*

The Ninth Circuit directs this court to design and implement a claims procedure. *Id.* at 948. This procedure is essentially mechanical in nature and entails a determination of the amount invested and the interest bought by each claimant and computation of the damages owed for each class member. *Arthur Young v. United States District Court,* 549 F.2d 686, 696 (9th Cir. 1977). The defendants' suggestion that the claims process must involve a reexamination of the class damages on an individual basis contravenes the Ninth Circuit rule that damage-related issues such as reliance may be proved on a class-wide basis. *Blackie v. Barrack,* 524 F.2d 891, 906 (9th Cir. 1975). In that regard, the claims procedure employed by this court will be straightforward collection and distribution of damages to the class, not a retrial of the substantive damage issues

on an individual basis. The court adopts the plaintiffs' proposed sequence for the claims process: entry of judgment, collection, mailing of claim forms, claim processing, claim payment and, finally, return of excess funds, if any.

The first steps in this process, entry of the amended judgment *nunc pro tunc* and collection of the damage awards, shall proceed immediately. To this effect, the court authorizes the plaintiffs' counsel to commence collection and appoints Special Master Hickey. The actual mailing of claim forms to the class will be delayed for a short period to permit further consideration on the questionnaire to be presented to the class members. Counsel are requested to submit additional briefing on the following questions:

> (1) Whether the defendants' proposed questions 6 and 7 should be included in the claim form under the Ninth Circuit's decision in *Harmsen*?
>
> (2) Whether either side will be prejudiced by the inclusion or exclusion of the proposed additions?

Counsel should *file* briefs on these two questions no later than ten days after the entry of this decision and order.

The court hereby rejects the other arguments advanced by defendants in connection with the claims procedure. Specifically, the court finds the defendants are liable to *all* USNB shareholders under Count IX (conspiracy to abuse control). Defendant Shannon's attempt to dispute the findings of the Special Master should have been made at trial, not in connection with a claims procedure. The issue of disputed shares was left for resolution by the trial jury based on the information provided in Special Master Hickey's report. The Ninth Circuit approved this procedure

for calculating injury to the class. *Harmsen, supra,* at 946. As to Helen Smith's argument that her liability extends only to those who purchased USNB stock after February 28, 1971, this court declines to dissect the jury verdict based on the defendant's supposition. Under Jury Instruction 21, any defendant could be found liable for all damages flowing from the conspiracy regardless of when they joined the agreement. Helen is liable to *all* USNB shareholders in the amount specified under Count IX.

Helen Smith moves for a reduction of the punitive damages against her in relation to any reduction in her total liability. The power to order a remittitur of punitive damages is within the discretion of this court. *Anglo-American General Agents v. Jackson National Life Ins. Co.,* 83 F.R.D. 41, 45 (N.D. Cal. 1979). While no reduction in the punitive award against Helen is appropriate at this juncture, the defendants are free to move for a review of the punitive award if the number of actual claims submitted significantly decreases the defendants' final compensatory liability. A reevaluation of the punitive damages would take place *after* completion of the claims process. Defendants are liable at this point for the full amount of their punitive damages and plaintiffs are free to collect those amounts. Should this court determine that a subsequent reduction is appropriate, the excess punitive damages would be returned in the same manner as any excess compensatory award.

II. LISTING OF VALLEY LANE FARMS

This court finds that Mr. Tellam's request to list portions of the Valley Lane Farms with Merrill Lynch Commercial Real Estate is appropriate under the Trust

Agreement entered into by Carl Smith Shannon. As indicated *supra,* the execution of the amended judgment should not be stayed.

The court hereby extends the preliminary injunction which presently restrains Helen Smith or the Bank of Irvine from foreclosing on Lot 7 of the property. Whatever hardships this short extension may cause lienholders is outweighed by the benefit of facilitating the sale of the trust property. This extension will continue through the exclusive listing period granted to Merrill Lynch.

DATED: December 1, 1983.

/s/ William B. Enright, Judge
United States District Court

Copies to:
All parties

Appendix B

United States Court of Appeals
For the Ninth Circuit

No. 84-7035

Helen Smith,
Petitioner,

vs.

United States District Court for the
Southern District of California,
Respondent,
Fred H. Harmsen, Ken Hansen, et al.,
Real Parties in Interest.

Order

Before: Skopil and Schroeder, Circuit Judges, and Aguilar, District Judge*

Petitioner Carol Smith Shannon is granted permission to join Smith's mandamus petition. The petition is denied. Petitioners fail to show that the district court erred in either its amended judgment or the other challenged orders. *See Bauman v. United States District Court*, 557 F.2d 650 (9th Cir. 1977).

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*The Honorable Robert Aguilar, United States District Judge for the Northern District of California, sitting by designation.

AFFIDAVIT OF SERVICE BY MAIL

State of California
City and County of San Francisco—ss.

Patricia M. Cde Baca , being first duly sworn, says:

That affiant is a citizen of the United States, over 18 years of age, and not a party to the within cause; that affiant's business address is 190 Ninth Street, San Francisco, California 94103; that affiant served the required number of copies of the attached Brief In Opposition "Harmsen Vs. Smith" In the Supreme Court of the U.S. on each of the following, by placing same in an envelope addressed (respectively) as follows:

See attached list

that each of said envelopes was then, on December 4, 1984, sealed and deposited in the United States mail at San Francisco, California, with the postage thereon fully prepaid; and that there is delivery service by United States mail at each place so addressed, or that there is regular communication by mail between the place of mailing and each place so addressed.

All parties required to be served have been served.

Patricia M. Cde Baca

Subscribed and sworn to before me

this 4 day of December, 1984

Jane Bourke

Notary Public in and for the City and County of San Francisco, State of California

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